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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

FILE: SRC 02 069 51675

OFFICE: TEXAS SERVICE CENTER

DATE: AUG 03 2002

IN RE: PETITIONER:  
BENEFICIARIES:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

**Public Copy**

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director shall be affirmed.

The petitioner is engaged in freight transportation, employs 750 persons and seeks to employ an additional 250 beneficiaries as tractor-trailer truck drivers for an undisclosed period of time. The director denied the petitioner because it was not accompanied by a temporary labor certification from the Department of Labor.

The certifying officer declined to issue a labor certification because he determined that the petitioner had not established that its need for the beneficiaries' services is temporary. The certifying officer stated:

We have reviewed the employer's file and supporting documentation and find that the employer has not sufficiently established a temporary need for additional tractor-trailer drivers. In the employer's necessity statement . . . . mention is made that LDA Leasing has clients involved in the construction business, requiring additional drivers for the transportation of building materials and steel products, during the months of March through October. There is nothing, however, to support the request for 250 drivers to fulfill this need, nor is there any documentation to support the number of clients requiring this service, the proposed additional truckloads this need will create for the employer, etc. The letter goes on to state that other LDA Leasing clients such as Wal-Mart Stores, Supervalu, Fleming Foods, etc., have peak needs for transport services from April to November. However there is nothing to specify why their peak needs are during that period of time, why they don't need as much transport support at other times of the year, etc. It is not sufficient for the employer to simply state that these clients have a peak load need, more specificity must be provided as to why they have a peak load need at the period of time mentioned. Also, the period of peakload need mentioned in this letter cover the months of March through November. However, the employer has requested a period of need . . . . of June through February. The true period of need based on the information within the necessity statement and the ETA 750 would imply there is actually a year round need for additional drivers.

While this office does not question that there is a severe shortage of tractor-trailer drivers, it does question the temporariness of such need, and feels that these positions could better be filled by the permanent alien employment certification program.

8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made. 8 C.F.R. 214.2(h)(6)(iv)(E) states that a petition not accompanied by a temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

Matter of Artee Corporation, 18 I&N Dec. 366 (Comm. 1982), specified that the test for determining whether an alien is coming temporarily to the United States to perform temporary services or labor is whether the need for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties that is controlling.

The petitioner is engaged in the field of freight transportation. It has a continuing need for tractor-trailer truck drivers and has not adequately explained a qualifying need for an additional 250 workers.

After review of the evidence contained in the record, the decision of the director is found to be correct.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

**ORDER:** The decision of the director is affirmed.